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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10                   UNITED STATES OF AMERICA,

11                   Plaintiff,

12                   v.

13                   JAMES RAY JONES,

14                   Defendant.

Case No. CR07-324RSL

ORDER DENYING DEFENDANT'S  
MOTION FOR EVIDENTIARY  
HEARING

15                   **I. INTRODUCTION**

16                  This matter comes before the Court on defendant's "Motion for Evidentiary Hearing  
17 Pursuant to Franks v. Delaware" (Dkt. #19). For the reasons set forth below, the Court denies  
18 defendant's motion for an evidentiary hearing.<sup>1</sup>

19                   **II. BACKGROUND**

20                  On August 13, 2007, Detective Sergeant Mark Shipman of the Mount Vernon Police  
21 Department received information that the department's 911 dispatch center had received a call  
22 concerning the possession and attempted sale of C4 explosives. See Dkt. #19, Exhibit A at 2  
23 (Warrant and Affidavit in Support of Warrant). Tye Gerald Burley had reported to the dispatch  
24 center that, approximately two weeks earlier, defendant had offered to sell him C4 explosives

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<sup>1</sup> Because this matter can be decided on the memoranda, declarations, and exhibits submitted by  
27 the parties, defendant's request for oral argument is denied.

1 that were allegedly stolen from an unnamed Navy base. Id. Burley also stated that, while at  
 2 defendant's house, defendant had shown him what defendant described as C4 explosives. Id.  
 3 Burley described the explosives as "rectangular in shape" and packaged in "green packaging  
 4 material with brown edges" that had "black lettering and numbering." Id.

5 Detective Shipman also contacted Crystal R. Brown, who told him that she had dated  
 6 defendant for about three months and that they had lived together at defendant's house for an  
 7 unspecified period of time. See Dkt. #19, Exhibit A at 2. Brown also stated that about two  
 8 months earlier defendant had shown her the explosives, which she described as a "5" x 5" black  
 9 brick" although she also described them as rectangular in shape. Id. Sergeant Barry Bartram, an  
 10 explosives expert with the Washington State Patrol, indicated that the descriptions provided by  
 11 both Burley and Brown were consistent with "how C4 Explosive is packaged" and concluded  
 12 that defendant was "most likely" in possession of "military C4 explosive." Id. Mason Reiter, an  
 13 Explosives Specialist with the Washington State Department of Labor and Industries, indicated  
 14 that possession of C4 in Washington is illegal, and that it is not possible to receive any type of  
 15 license that would authorize possession. Id. Detective Shipman also ran a criminal history  
 16 check on defendant, which indicated that defendant was a convicted felon. Id.

17 Detective Shipman provided this information to Skagit County District Court Judge  
 18 Warren Gilbert, who signed a search warrant authorizing a search of defendant's residence. See  
 19 Dkt. #19, Exhibit A at 1. During the search, police officers found one pound of "Military TNT  
 20 High Explosive." See Dkt. #19 at 2; Dkt. #23 at 2 (Response to Motion for Evidentiary  
 21 Hearing). Defendant was subsequently indicted for unlawful possession of stolen explosives in  
 22 violation of 18 U.S.C. § 842(h). See Dkt. #10 (Indictment). A subsequent review of defendant's  
 23 court documents revealed that the official database entry used by Detective Shipman was  
 24 erroneous, and defendant had been convicted of a gross misdemeanor, not a felony. See Dkt. #  
 25 19 at 5; Dkt. # 23 at 2.

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### 1                   III. ANALYSIS

2                   Defendant alleges that Detective Shipman's reckless disregard for the truth mislead Judge  
3 Gilbert into making a clearly erroneous finding of probable cause. Specifically, defendant  
4 alleges that Detective Shipman failed to alert Judge Gilbert that the informants did not  
5 specifically mention seeing "C4" on the explosives packaging material, and that Detective  
6 Shipman relied upon an official database entry that incorrectly characterized defendant as a  
7 convicted felon. See Dkt. #19 at 4-5. The Court finds neither of these acts of alleged  
8 recklessness sufficient to render Judge Gilbert's finding of probable cause clearly erroneous.

9                   Defendants are entitled to an evidentiary hearing only after making a substantial  
10 preliminary showing that a government affiant intentionally or recklessly made false statements  
11 necessary to the finding of probable cause. See Franks v. Delaware, 438 U.S. 154, 171 (1978).  
12 In order to make a substantial preliminary showing a defendant must: 1) allege specifically  
13 which portions of the warrant affidavit are false, 2) contend that the false statements or  
14 omissions were deliberately or recklessly made, 3) present a detailed offer of proof, including  
15 affidavits, to accompany the allegations, 4) challenge only the veracity of the affiant and 5)  
16 establish that the challenged statements are necessary to a finding of probable cause. See United  
17 States v. Perdomo, 800 F.2d 916, 920 (9th Cir. 1986) (citing United States v. DiCesare, 765 F.2d  
18 890, 894-95 (9th Cir. 1985)).

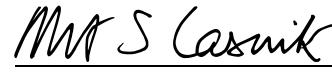
19                   Probable cause is a "fluid concept which depends upon the 'totality of the  
20 circumstances.'" United States v. Estrada, 733 F.2d 683, 685 (9th Cir. 1984) (quoting Illinois v.  
21 Gates, 462 U.S. 213, 230 (1983)). When issuing a search warrant based upon probable cause,  
22 the magistrate makes a "'practical, common-sense decision whether, given all of the  
23 circumstances set forth in the affidavit before him . . . there is a fair probability that contraband  
24 or evidence of a crime will be found in a particular place.'" Id. (quoting Gates, 462 U.S. at 238)  
25 (alteration in original). A reviewing court ensures that "'a magistrate had a substantial basis for  
26 . . . concluding that probable cause existed.'" Id. at 684 (quoting Gates, 462 U.S. at 238-39)

1 (alteration in original). A reviewing court is required to show “great deference to the  
2 magistrate’s determination,” and may not reverse unless it is “clearly erroneous.” Id. (citing  
3 United States v. Seybold, 726 F.2d 502, 503 (9th Cir. 1984)). Here, defendant cannot  
4 demonstrate that even the combination of including the informants’ failure to notice “C4” on the  
5 explosives’ packaging and removing defendant’s false felony conviction would have precluded a  
6 finding of probable cause. Detective Shipman’s affidavit contained two eyewitness descriptions  
7 of the explosives in question, both of which were based upon first hand observation. See Dkt.  
8 #19, Exhibit A at 2. Furthermore, an explosives expert corroborated that these descriptions were  
9 consistent with how C4 is packaged. Id. Even if the affidavit indicated that neither informant  
10 noticed “C4” on the explosives’ packaging and did not include defendant’s false felony  
11 conviction, Judge Gilbert would still have had substantial basis for finding that probable cause  
12 existed. Thus, as neither the omitted information nor the false felony conviction is necessary to  
13 a finding of probable cause, defendant fails to make the substantial showing necessary for the  
14 Court to grant an evidentiary hearing.

#### 15 IV. CONCLUSION

16 For all of the foregoing reasons, the Court DENIES defendant’s “Motion for Evidentiary  
17 Hearing Pursuant to Franks v. Delaware” (Dkt. #19).

18  
19 DATED this 21st day of December, 2007.

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21   
22 Robert S. Lasnik  
23 United States District Judge  
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